SUPREME COURT, U. S.
DEC 9 1974
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In the Supreme Court of the United States

October Term, 1974

No. 74-716

MORGAN N. MADDEN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff,

vs.

ALLIED PLUMBING AND HEATING CO.,

Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

S. Rex Lewis
HOWARD, LEWIS & PETERSEN
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Provo, Utah 84601

Attorneys for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Morgan N. Madden, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit on September 10, 1974, denying a petition for a rehearing and also to review the judgment and unpublished opinion of

the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on May 31, 1974.

OPINIONS BELOW

A judgment on June 11, 1973, in the District Court was entered in favor of the plaintiff. This judgment and the findings of fact and conclusions of law are reproduced in Appendix A to this Petition.

The unpublished opinion of the Court of Appeals on May 31, 1974, reversing the judgment of the District Court, is reproduced in Appendix B to this Petition.

The order of the Court of Appeals of September 10, 1974, denying the petition for rehearing is reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on May 31, 1974, (Appendix B, *infra*, p. xviii.) A timely petition for rehearing was denied on September 10, 1974. (Appendix C, *infra*, p. xx.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

The questions presented are (1) Whether the Tenth Circuit rendered a decision that conflicts with the decisions rendered by the Ninth and Fifth Circuits on the same question. (2) Whether the Tenth Circuit rendered a decision which conflicts with the applicable common law of the State of Utah.

STATEMENT OF THE CASE

This case originated upon the filing of a complaint against the United States of America under the Federal Tort Claims Act, 28 United States Code, Section 1346(b), 2671 et seq. (App. B, infra, p. viii). Plaintiff was a structural iron worker who sought damages for personal injuries suffered while working as an employee of a subcontractor at the Tooele Army Depot in Utah (App. B, infra, p. viii). Plaintiff, as a structual iron worker who was doing overhead rigging, was required on Decembar 17, 1968, to climb the vertical beams of Building 612 on the Army Depot in order to install a heating unit on top of the building. Both State and Federal safety regulations required workers who worked six feet or higher above the ground to have and use certain safety equipment. Plaintiff was working without planks, nets, safety belts or any other safety devices designed to protect against falls (App. B, infra, p. ix) and plaintiff never had been furnished any safety devices while engaged in overhead rigging some sixty-five feet above the ground. Plaintiff fell from the top of the building and was seriously injured.

Plaintiff's complaint claims the Government safety officer, knowing of the hazardous condition, failed to correct it (App. B, infra, p. x). After trial the District Court held the Government's negligence was the direct and proximate cause of Madden's injuries and that he was entitled to a judgment for $66,307.00 against the Government. The Tenth Circuit reversed the District Court's judgment finding (App. B, infra, p. xi) that:

It is necessary to decide only the issue whether

> liability was properly imposed on the Government for negligence in breach of a duty to Madden. Concluding that United States v. Page, 350 P. 2d 28 (10th Cir.), cert. denied 328 U. S. 979, and similar decisions are dispositive of this issue, we must reverse the judgment against the Government.

A petition for rehearing was denied by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

1. As a general rule a person who employs an independent contractor to secure the performance of certain work, not inherently dangerous to others, is not responsible for injuries caused by the negligent acts of the contractor. However, the exceptions to the general rule are so numerous as to swallow up the rule. One of the exceptions is that if the work is inherently dangerous the employer has a nondelegable duty to others to see that the work is performed safely. The Utah Supreme Court has never directly ruled on whether employees of an independent contractor are included within the protected class of third persons to whom a duty is owed when the performance of the contracted work is inherently dangerous, however, petitioner submits there exists ample authority that the duty to third persons in Utah does encompass the independent contractor's employees. See *Dayton* v. *Free*, 46 Utah 277, 148 P 408 (1915); *Callahan* v. *Salt Lake City*, 41 Utah 300, 125 P. 863 (1912); *Sullivan* v. *Utah Gas Service Company*, 10 Utah 2d 359, 353 P. 2d 465 (1960); and *Gleason* v. *Salt Lake City*, 94 Utah 1, 74 P. 2d 1225 (1937). A close reading of all these cases suggests that Utah would include within the protected class, employees of the independent contractor, when the performance of the contracted work is inherently dangerous. The Ninth Circuit

in *Thorne* v. *United States*, 479 F. 2d 804 (1973) recognized that Utah would so extend the duty to employees. The Ninth Circuit stated, ". . . other California cases demonstrate that the *alleged* Utah rule is not followed in California". (emphasis added) The Ninth Circuit's usage of the words, "alleged Utah rule", refers to the Tenth Circuit's questionable interpretation of Utah law in *United States* v. *Page*, 350 F. 2d 28 (10th Cir., 1965), Cert. denied 382 U.S. 979, 86 S. Ct. 552, 15 L.Ed. 2d 470. This dulious interpretation by the Tenth Circuit interpreted Utah law as not extending any such a duty to employees of the contractor. Petitioner submits that a careful reading of the Utah cases, supra, indicates that the common law of Utah does extend this duty to employees.

2. Utah law, which recognizes the nondelegability of a duty to employees, is identical to the common law of California. See *Thorne*, supra, and Utah law is also identical to the common law of Florida. See *Orr* v. *United States*, 486 F. 2d 270 (5th Cir. 1973). All three states—California, Utah and Florida—recognize that the employers duty extends to the employees of the independent contractor when the independent contractor is performing inherently dangerous work. The Ninth Circuit in *Thorne*, supra, and the Fifth Circuit in *Orr*, supra, both held the duty extends to employees. Both circuits held that the employer has a duty to employees of the independent contractor which can't be delegated to an independent contractor so as to evade liability.

A conflict exists between the decisions rendered by the Ninth and Fifth Circuits in *Thorne*, supra, and *Orr*, supra, and the decision rendered in the instant case by the Tenth Circuit. The same matter was involved in each case in all three Circuit Court decisions inasmuch as the common law

of each state provided for the nondelegability by the employer of a duty to be responsible for injuries to the employee of an independent contractor incurred in an inherently dangerous activity. Yet with the same subject matter before all three Circuit Courts, the Ninth and Fifth Circuits rendered decisions directly in conflict with the decision rendered by the Tenth Circuit in the instant case.

3. Utah recognized the nondelegability by the employer of a duty to employees of an independent contractor when that contractor is performing inherently dangerous work. The Tenth Circuit in the instant case invoked *Page*, supra, to so interpret Utah common law as not recognizing any such duty to the employee. The Tenth Circuit, therefore, rendered a decision in direct conflict with applicable Utah law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

S. Rex Lewis
HOWARD, LEWIS & PETERSEN
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

MORGAN N. MADDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

ALLIED PLUMBING & HEATING CO. INC., a Utah corporation.
Third-Party Defendant.

Civil No. C-173-71
Judgment

The matter came on before the court for trial on May 30, 1973, with the Honorable Willis W. Ritter, Chief Judge, presiding. The parties were represented by their respective counsel of record. The court having heard evidence presented by the parties relative to the issues set forth in the Pretrial Order, and the court having heretofore entered Judgment on plaintiff's Complaint in favor of the plaintiff and against the defendant and third-party plaintiff United States of America in the sum of $66,307.55, and the court having further considered the evidence relating to the third-party Complaint filed in this section by the United States of America against Allied Plumbing and Heating Company, Inc., and the court being fully

advised on the issues pertaining thereto, and having heretofore entered its Findings of Fact and Conclusions of Law relative to the third-party action; now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the third-party plaintiff United States of America is awarded judgment against the third-party defendant Allied Plumbing and Heating Company, Inc. in the sum of $66,307.55, with interest thereon at the rate of 8 percent per annum, as provided by law, plus costs of court expended in connection with this action.

DATED this 11th day of June, 1973.

/s/ Willis W. Ritter
WILLIS W. RITTER, Chief Judge
United States District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing JUDGMENT to S. Rex Lewis, Attorney for Plaintiff, 120 East 300 North, Provo, Utah 84601, and Raymond M. Berry, Attorney for Third-Party Defendant, Continental Bank Bldg., Salt Lake City, Utah 84101, this —— day of June, 1973.

/s/ Jean Deoung
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MORGAN N. MADDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff.

vs.

ALLIED PLUMBING & HEATING CO. INC., a Utah corporation.
Third-Party Defendant.

Civil No. C-173-71

Findings of Fact and Conclusions of Law

The above matter came on before the court for trial on May 30, 1973, with the Honorable Willis W. Ritter, Chief Judge, presiding. The parties were represented by their respective counsel of record. The court having heard evidence presented by the parties relative to the issues set forth in the Pretrial Order, and the court having heretofore entered Judgment in favor of the plaintiff and against the defendant and third-party plaintiff United States of America in the sum of $66,307.55, and the court having further considered the evidence relating to the third-party complaint filed in this action by the United States of America against Allied Plumbing and Heating Company, Inc., and the court being fully advised on the issue pertaining thereto, the court now makes the following

FINDINGS OF FACT

1. In this action the court has heretofore entered its Judgment awarding damages in the sum of $66,307.55, plus interest and costs, in favor of the plaintiff and against the defendant and third-party plaintiff United States of America.

2. On November 18, 1968, the third-party plaintiff and the third-party defendant entered into a written contract whereby the third-party agreed to install steam-heated air replacement units in Building 612 at the Tooele Army Depot, Tooele, Utah. Under the terms of the contract the third-party defendant agreed to comply with all pertinent provisions of Corps of Engineers Manual EM 385-1-1, dated 13 March 1958, entitled "General Safety Requirements," as amended, and to require its subcontractors to comply with said manual. Third-Party defendant further agreed in the contract to take proper safety and health precautions to protect the work, the workers, the public and property of others.

3. Third-party defendant failed to comply with the terms and provisions of the contract in that it did not provide adequate and proper safety equipment for the employees of its subcontractors, including the plaintiff in this action, nor did third-party defendant require its subcontractors to provide adequate and proper safety equipment for such employees. Third-party defendant thereby violated the provisions of the contract of the parties and is responsible for damages to the United States of America.

4. The damages suffered by the third-party plaintiff as a result of such breach of contract is equal to the amount

awarded herein to the plaintiff against the United States of America in the sum of $66,307.55, plus interest and costs.

The court having made the above Findings of Fact now makes the following

CONCLUSION OF LAW

1. There are no disputed issues of fact to be decided in this action, and the jury impaneled to decide the questions of fact was excused by the court prior to the decision rendered in this matter.

2. The third-party plaintiff is entitled to recover damages against the third-party defendant in the sum of $66,307.55, plus interest and costs.

3. The award of Workmen's Compensation benefits to the plaintiff as a result of his injuries has no effect on this action.

DATED this 11th day of June, 1973.

BY THE COURT:

/s/ Willis W. Ritter
WILLIS W. RITTER, Chief Judge
United States District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to S. Rex Lewis, Attorney for plaintiff, 120 East 300 North, Provo, Utah 84601, and Raymond M. Berry, Attorney for Third-Party Defendant, Continental Bank Bldg., Salt Lake City, Utah 84101, this —— day of June 1973.

/s/ Jean DeLoung
Secretary

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1553 and 73-1554

MORGAN N. MADDEN,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant and Third Party Plaintiff-Appellee,

v.

ALLIED PLUMBING AND HEATING CO., INC.,
Third Party Defendant-Appellant.

Appeal from the United States District Court for the District of Utah Central Division (D.C. No. C-173-71)

Raymond M. Berry, Salt Lake City, Utah (Worsley, Snow & Christensen, Salt Lake City, Utah, on the brief) for Defendant-Appellant, Allied Plumbing & Heating Co., Inc.

Jean A. Staudt, Attorney, Department of Justice, Washington, D.C. (Irving Jaffee, Acting Assistant Attorney General, and C. Nelson Day, United States Attorney, and Robert E. Kopp, Attorney, Department of Justice, on the brief) for Defendant-Appellant, United States of America.

S. Rex. Lewis, Attorney, Provo, Utah (Howard, Lewis & Petersen, Provo, Utah, on the brief) for Plaintiff-Appellee.

Before HILL, HOLLOWAY, and BARRETT, Circuit Judges

HOLLOWAY, Circuit Judge

This action under the Federal Tort Claims Act, 28 U.S.C.A. § § 1346 and 2671 *et seq.*, sought damages for personal injuries suffered by plaintiff-appellee Madden while working as an employee of Campbell & Robinson Construction Company (C & R), a subcontractor on work at Tooele Army Depot in Utah. Madden claimed there was negligence by a Government safety officer in not correcting a known hazardous condition, a lack of safety devices, resulting in a fall and injury to him. Relying on United States v. Page, 350 F.2d 28 (10th Cir.), cert. denied, 382 U.S. 979, the Government denied any duty or liability to Madden.

The Government asserted a third party complaint against the general contractor, Allied Heating & Plumbing Co., Inc. (Allied), seeking judgment over against Allied if it was held liable to Madden. This third party complaint averred that Allied failed to provide adequate safety equipment to Madden and failed to require its subcontractor, C & R, to take adequate safety measures to insure the safety of its employees. C & R was not made a party.

The facts are essentially undisputed. On November

18, 1968, the Department of the Army entered into a construction contract with Allied for the purchase and installation of five steam heated air replacement units for Building 612 on the Tooele Army Depot, Tooele, Utah. The work required the placing of blowers in the apex of Building 612 which necessitated the employment of iron workers to place the steel to hold the blowers. Allied subcontracted with C & R, steel erectors, to place the blowers. Plaintiff Madden was an employee of C & R on this work.

On December 17, 1968, plaintiff was assigned to help install the blowers in the apex of Building 612. There is disagreement as to the exact height above ground level plaintiff was working, but it was apparently in excess of 35 feet. Plaintiff was working without planks, nets, safety belts or any other safety devices designed to protect against falls. During the course of his work, plaintiff fell from his position near the apex of the building, sustaining injuries to his right side, particularly the shoulder area.

Several hours before the accident Mr. Christiansen, a safety officer for the Army, visited Building 612 in response to a complaint that compressed gas cylinders were being improperly used. After being informed of the situation, the C & R foreman immediately corrected it.

Mr. Christiansen then noticed workmen in the framework of the building without safety planking or lines. He brought this to the attention of the C & R foreman who agreed to get some planking, but Christiansen did not remain in the building to see that the planking was installed and did not return before the accident. About four or five hours later Madden was climbing back up the

building structure to tell the men they had to change the rigging. His hand slipped on some loose paint and he fell. After the accident planking was installed.

Madden's complaint alleged that the Government retained and exercised control over the work performed by the contractor who employed him. He claimed also that the Government safety officer, knowing of the hazardous condition, failed to correct it. As stated, the Government's third-party complaint against Allied alleged that negligence by Allied as to the safety measures, in violation of Allied's contractural duty to the Government, made Allied liable for any damages recovered by Madden from the Government.

After trial the court found the Government did retain and exercise control over the work performed by the contractor. The court also found that the Government was negligent in that its employees, knowing of the unsafe and dangerous working condition, failed to remain in the area to see that the unsafe condition was corrected. It was further found that C & R's foreman was negligent in failing to correct the hazard. The court then held that the Government's negligence was the direct and proximate cause of Madden's injuries and that he was entitled to judgment for $66,307.55 against the Government.

In ruling on the third party complaint the court found that Allied had failed to comply with the terms of the contract in that it did not provide adequate safety equipment for the employees of its subcontractors and that Allied had not required its subcontractors to provide adequate safety equipment for such employees. The court then found that

Allied had violated the provisions of the contract and was liable for the damages recovered by Madden from the Government. Both the Government and Allied appeal.

We find it necessary to decide only the issue whether liability was properly imposed on the Government for negligence in breach of a duty to Madden. Concluding that United States v. Page, 350 F.2d 28 (10th Cir.), cert. denied, 382 U.S. 979, and similar decisions are dispositive of this issue, we must reverse the judgment against the Government. This determination against liability by the Government also requires setting aside the judgment over against Allied.

For affirmative plaintiff Madden first argues that the Government breached a duty to provide a safe working place for him as provided by the contract and other applicable safety regulations. We cannot agree.

In the *Page* case, the trial court found that the government had a duty with regard to safety conditions in view of the rights reserved under its contract to prescribe and impose safety regulations in addition to those specified in the contract. And such liability was also premised on the Government's reserved right to inspect the plant and work performed by the contractor.

In reversing the decision against the Government, we held, 350 F.2d at 30-31:

> The fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of nonliability

for the torts of the contractor because no duty is created to employees or third parties. This includes the reservation to inspect for the adherence to contract safety provisions. Kirk v. United States, 270 F.2d 110 (9th Cir.).

We are satisfied from our study of *Page*, cases cited therein, and cases which have followed *Page*, that the relevant provisions of the contract involved here do not differ in any significant respect from the contract provisions involved in *Page*, and the cases following it. Those pertinent contract provisions in this case are set out in the margin.[1]

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[1]General Provision 12, Standard Form Construction Contract, 23-A provides:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take property safety and health precautions to protect the work, the workers, the public, and the property of others.

The remaining relevant contract provisions are as follows:

> General Condition — 13. *Accident Prevention* (Jan. 1965) (ASPR 7-602.42 Rev. 9, dated 29 Jan. 1965).
>
> (a) In order to provide safety controls for protection to the life and health of employees and other persons; for prevention of damage to property, materials, supplies, and equipment; and for avoidance of work interruptions in the performance of this contract, the Contractor shall comply with all pertinent provisions of Corps of Engineers Manual, EM 385-1-1, dated 13 March 1958, entitled "General Safety Safety Requirements", as amended, and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose.

Essentially they contain the same terms as are described in *Page* reservation of the right to prescribe and impose safety regulations in addition to those contained in the contract and to inspect the contractor's facilities and work performed by him. See 350 F.2d at p. 30.

Secondly, plaintiff Madden argues that the Government was owner of the premises and, therefore owed a duty to provide a safe working place. He argues that *Page* does not apply since the accident here happened on property

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(Footnote 1 continued.)

(b) The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents, resulting in death, traumatic injury, occupational disease, and damage to property, materials, supplies and equipment incident to work performed under this contract.

(c) The Contracting Officer will notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately take corrective action. Such notice, when delivered to the Contractor or his representative at the site of the work, shall be deemed sufficient for the purpose. *If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken.* No part of the time lost due to any such stop orders shall be made the subject of claim for extension of time or for excess costs or damages by the Contractor.

(d) Compliance with the provisions of this article by subcontractor will be the responsibility of the Contractor.
GC-14. *Government Inspectors* (Jan. 1965) (ASPR 7-602.43 Rev. 9, dated 29 Jan. 1965).

The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. No inspector is authorized to change any provision of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the contract.

owned, controlled and in the possession of the Government, while in *Page* the employees were working in the contractor's plant. A similar argument was considered and rejected by this court in Craghead v. United States, 423 F.2d 664, 666 (10th Cir.):

> Exclusive control of the worksite, which Plaintiffs argue is essential to the holding in the *Page* case, appears not distinguishable in principle from the pertinent control which the contractors exercised over the ladder and scaffold in question here. Although in both cases before us the right of inspection and the right to enforce certain safety measures specified in the contracts were reserved by the government, in neither case is there any indication or claim that the right of control *over employees* of the independent contractors was reserved by the government. (emphasis added)

And see also Irzyk v. United States, 412 F.2d 749 (10th Cir.); Kirk v. United States, 270 F.2d 110 (9th Cir.) (holding the Government not liable for an accident where an independent contractor failed to provide safety belts and the like); Roberson v. United States, 382 F.2d 714 (9th Cir.); Gowdy v. United States, 412 F.2d 525 (6th Cir.).

Similarly here, the subcontractor C & R was exercising control over the equipment being used and the portions of Building 612 necessarily involved in the installation of the blowers. Although plaintiff contends that the Government was to "generally direct" the work, there is no showing that it reserved the right to control individual employees of the independent contractor. Thus, the fact

that the work was being conducted on Government premises fails to remove this case from the rationale of *Page*.

Third, plaintiff Madden argues that the Government safety officer breached a duty to Madden by walking off and leaving him working under known and hazardous conditions. He says that *Page* does not apply because here the Government had actual knowledge through the safety officer of the hazardous condition and full authority and ample opportunity to stop the work and correct the condition, while in *Page* there was no such actual knowledge and opportunity.

This argument is untenable in view of contract provisions GC-14 and GC-13(c). These provisions make clear that the safety inspector's duty was merely to insure strict compliance with the terms of the contract and to report any failure to comply to the contracting officer who was the proper party to take corrective action. And, more importantly, since there is no underlying duty to the subcontractors' employees under the rationale of *Page*, the argument of actual knowledge and opportunity to stop the work is unavailing. Without an underlying duty in such circumstances there can be no liability, regardless of the additional circumstances of knowledge.

Fourth, plaintiff Madden contends that the Government, as a "Good Samaritan" had a duty to exercise control over the independent contractor's work and to promote safety but breached this duty to Madden by knowingly leaving him in a hazardous working condition. Again the argument runs counter to our reasoning in *Page*. We said there that by administering a safety program the

Government did not subject itself to claims of negligence in carrying out the program. We stated that the contractor had the primary responsibility for the safety of its employees and direct control and supervision of them. Moreover the contractor had the duty to supervise individual functions, the total of which produced the end product, and the safety programs of the Government did not constitute any exercise of such control. 350 F.2d at 31; see also Roberson v. United States, 382 F.2d 714, 720-22 (9th Cir.); Beason v. United States, 396 F.2d (5th Cir.); Wright v. United States, 404 F.2d 244, 247 (7th Cir.).

Madden also stresses the findings of fact by the trial court that the Government retained and exercised control over the project and had knowledge of the hazardous condition. We have dealt with the point concerning knowledge of the condition previously. As to the finding on control, the only proof relating to the finding consisted of testimony on the safety inspector's actions, outlined above, and the contract provisions. We turn now to this proof on the finding of control.

As mentioned, the safety officer, Mr. Christiansen, made an actual visit to the work site a few hours before the accident. The director for maintenance had asked him to look at some compressed gas cylinders that he felt were being handled unsafely. After looking at the cylinders, Christiansen contacted the foreman responsible for these cylinders and talked to him about getting the condition corrected, which he did. While there he also noticed people working up in the framework of the building installing the heaters. They were about 40 feet up and were sitting on beams and he saw one man walk across one of the beams.

He concluded it was unsafe for them to be working up there without any support and contacted the same foreman again and the foreman said he would get some planking. Christiansen did not stay to see whether this was done.

We are satisfied such proof of actions by the safety officer does not support a finding that the Government exercised control over the independent contractor's employees. Therefore the proof and finding on control were not sufficient to impose liability on the Government. See United States v. Page, 350 F.2d 28, 31 (10th Cir.), cert. denied, 382 U.S. 979; Craghead v. United States, 423 F.2d 664, 666 (10th Cir.).

The other proof concerned the contract provisions. In *Page* this court held that similar Government contract provisions relating to safety inspections, regulations and supervision do not alter the general rule that the independent contractor has the primary responsibility for the safety of his employees. And we further reasoned that such provisions do not create such an affirmative control and direction by the Government over employees of the contractor that the Government is liable for their injuries. 350 F.2d at 31. Similarly in Eustler v. United States, 376 F.2d 634, 636 (10th Cir.), a case involving parallel contract provisions, this court stated that the Government neither expressly nor impliedly contracted to control the work of the contractor's employees.

Insofar as the finding of Government control was premised on the contract provisions, we must hold it was in error. Under *Page* and cases following it, contractual rights may not serve as a basis for holding the Government liable.[2]

Under these principles we must hold that the trial court erred in finding and holding that there was control by the Government which destroyed the independent contractor relationship. We are satisfied that such control did not exist and that the Government did not, by reserving the right to inspect the work or other contract provisions, or by actions taken, become liable for damages such as were suffered by plaintiff Madden.

Lastly, plaintiff argues that the trial court found a definite causal connection between the safety inspector's negligence in not enforcing the safety standards and the injuries suffered by Madden. A similar contention was rejected in United States Fidelity & Guaranty Co. v. United States, 446 F.2d 851, 853 (10th Cir.):

> The trial court stated that the Government's inspector was as negligent as the contractor; however, since there was no duty owed from the government to the injured persons, this conclusion is of no particular significance. . . .

See also Irzyk v. United States, 412 F.2d 749 (10th Cir.).

For these reasons, the judgment against the Government must be set aside. And since we conclude that there is no liability on the original complaint, the Government is not entitled to any recovery over against Allied. Accordingly, the judgments are reversed.

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[2]Insofar as the finding of control is premised on the contract provisions, it should be viewed as essentially a legal conclusion and not a finding of fact subject to the clearly erroneous rule of Rule 52 F. R. Civ. P. See United States v. Mississippi Valley Generating Co., 364 U. S. 520, 526; United States v. Wholesale Oil Co., 154 F. 2d 745, 747 (10th Cir.); Thomas v. Commissioner, 254 F. 2d 233, 236 (5th Cir.)

APPENDIX C

United States Court of Appeals
Tenth Circuit
Office of the Clerk
469 United States Courthouse
Denver, Colorado 80202
September 10, 1974

S. Rex Lewis, Esq.
Howard, Lewis & Petersen
Delphi Building
120 East 300 North Street
Provo, Utah 84601

Re: Nos. 73-1553 & 73-1554, Morgan N. Madden, v. U.S.A. & Allied Plumbing & Heating

Dear Mr. Lewis:

Enclosed is a certified copy of an order entered in the captioned cases, denying your petition for rehearing.

Very truly yours,
HOWARD K. PHILLIPS
Clerk
by: MARY A. SHERMAN
Deputy Clerk

mas

cc: Raymond M. Berry, Esq., Attorney at Law, 7th Floor, Continental Bank Building, Salt Lake City, Utah 84101
Thomas E. Joyce, Esq., Attorney at Law, 428 Brotherhood Bldg., Kansas City, Kansas
Robert E. Kopp, Attorney, Jean A. Staudt, Atty., Dept. of Justice, Washington, D.C. 20530

SEPTEMBER TERM - SEPTEMBER 10, 1974

Before The Honorable Delmas C. Hill. The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges

MORGAN N. MADDEN,
Plaintiff-Appellee.

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff and Cross-Appellant.

vs.

ALLIED PLUMBING & HEATING CO., INC., a Utah corporation.
Third Party Defendant-Appellant.

No. 73-1553
No. 73-1554

This matter comes on for consideration of the petition for rehearing filed by the appellee in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied.

A true copy
Teste

HOWARD K. PHILLIPS
Clerk

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

Mary A. Sherman
Deputy Clerk

SUPREME COURT, U. S.
FILED
DEC 9 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1974

No. 74-716

MORGAN N. MADDEN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff,

vs.

ALLIED PLUMBING AND HEATING CO.,

Third-Party Defendant.

ADDENDUM TO APPENDIX A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MORGAN N. MADDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

ALLIED PLUMBING & HEATING CO. INC., a Utah corporation.
Third-Party Defendant.

Civil No. C-173-71
Judgment

ADDENDUM TO APPENDIX A

This action came on for trial before the Court, the Honorable Willis W. Ritter, Chief Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, Morgan N. Madden, recover of the defendant, United States of America, the sum of $66,307.55, with interest at the rate of 8% per annum, as provided by law, and his costs of this action.

Dated at Salt Lake City, Utah, this 6th day of June 1973.

BY THE COURT

WILLIS W. RITTER.
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MORGAN N. MADDEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

ALLIED PLUMBING & HEATING CO. INC., a Utah corporation.
Third-Party Defendant.

Civil No. C-173-71

Findings of Fact and Conclusions of Law

This action between the plaintiff and the defendant, United States of America, having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT

1. This action is brought under the Federal Tort Claims Act, 28 U.S.C., Section 146, 2671 et seq. Plaintiff is a citizen of the United States, residing in Utah County, State of Utah.

2. At all times herein mentioned, the defendant, United States of America, and its employees, acting within

the scope of their employment, maintained, owned and controlled the Tooele Army Depot located in Tooele, Utah.

3. Plaintiff has complied with the Federal Tort Claims Act by filing a claim with the Department of the Army, U. S. Claims Service, which claim had been filed for over six months without action being taken thereon and prior to the filing of plaintiff's complaint.

4. On December 17, 1968, plaintiff was employed by C. & R Construction Company as a structural iron worker for contract work in Building 612 located at the Tooele Army Depot.

5. Plaintiff was working near the apex of Building 612 in preparing rigging with which to hoist machinery and was working over 35 feet above the ground on and about the beams and monorail in the ceiling of said Building 612.

6. Plaintiff, due to an accumulation of old paint and debris, slipped and fell from the apex of the building to the floor of the building, causing plaintiff permanent injuries.

7. The project on which the plaintiff was working was governed by the Army Corps of Engineers' General Safety Requirements, Engineers' Manual, 381-1-1 dated 1 March 1967 and amended 7 December 1967, and the General Safety Orders of Utah in effect in December of 1968, which require that workers working in excess of 6 feet above the ground be supplied with certain safety equipment and devices.

8. Defendant retained and exercised control over the work performed by the contractor.

9. An employee of the defendant and its safety officer, Gail H. Christiansen, approximately four hours prior to plaintiff's fall, saw plaintiff and his co-workers working in and above the apex of Building 612 without safety devices or a safety platform and said safety officer pointed out to plaintiff's foreman that such method of working was unsafe and in violation of government safety standards.

10. The defendant was negligent in that its employee, Gail H. Christiansen, knowing of the unsafe and dangerous working condition, failed to remain in the area to see that the unsafe condition was corrected and in that he failed to require the plaintiff's employer to immediately correct the hazard, and in that he failed to require that the work be stopped until the hazard was corrected.

11. The defendant, United States of America, was charged with notice of the unsafe and hazardous working condition of the plaintiff and had adequate opportunity to correct the condition or enforce the correction of the condition and it failed to do so.

12. Plaintiff's foreman, Jay Jolley, was negligent in not doing what he advised the government safety officer Christiansen that he would do in correcting the hazard.

13. The defendant's safety officer, Gail H. Christiansen, knowingly walked off the premises, leaving a highly dangerous and hazardous working condition for the plaintiff.

14. The defendant, United States of America, is chargeable with its safety inspector's negligence.

15. The negligence of the defendant was the direct and proximate cause of the plaintiff's injuries.

16. The plaintiff did not assume the risk of his injuries.

17. The plaintiff was not guilty of any contributory negligence and was exercising ordinary care and prudence in his work.

18. Plaintiff was in good health prior to his injury of December 17, 1968. Plaintiff is 46 years of age at the present time, married and living with his wife and 5 children, all of whom he supports.

19. Plaintiff has been an iron worker since 1949. Plaintiff sustained injury to his right rib cage, head, and a tear of the rotator cuff, right shoulder, requiring surgery. Plaintiff now has a thirty percent loss of function of his right shoulder, which is permanent and will persist throughout the remainder of his life. In addition to the loss of function, plaintiff has weakness in his right arm, loss of dexterity, numbness in his right ring and little finger, and tends to drop things.

Plaintiff is unable to perform work that he would prior to his injury, in that he is unable to work in the air as a connector, or a welder, nor is he able to hang iron. Now plaintiff must find iron work he can do on the ground or be a supervisor, or be unemployed in his field of work. Plaintiff has been unable to continue as a coach of a little

league baseball and football team. He is unable to sleep the night through without waking with pain in his shoulder.

20. As a direct and proximate cause of defedant's negligence, plaintiff has incurred medical expenses, including expenses for doctors, hospitals and drugh, in the sum of $1,307.55, and has lost wages in the sum of $15,000.00, for which he is entitled to recover.

21. As a further direct and proximate cause of defendant's negligence, plaintiff has suffered permanent injuries which limit him in his regular occupation as a structural iron worker and in his enjoyment of life, and is entitled to general damages in the amount of $50,000.00.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSION OF LAW

1. The defendant, United States of America, was negligent, which negligence was the direct and proximate cause of the plaintiff's injuries.

2. The plaintiff did not assume the risk of his injuries.

3. The plaintiff was not contributorily negligent.

4. The plaintiff is entitled to judgment against the United States of America for his medical expenses in the sum of $1,307.55, for his loss of wages incurred at the time of the trial in the sum of $15,000.00, and for general damages in the sum of $50,000.00.

IT IS SO ORDERED and counsel for plaintiff will submit appropriate judgment in accordance herewith.

Dated this 6th day of June, 1973.

BY THE COURT

WILLIS W. RITTER,
Chief Judge
United States District Court

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-716

MORGAN N. MADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit denying petitioner recovery against the United States under the Federal Tort Claims Act.

In November 1968, the Department of the Army entered into a construction contract with the Allied Plumbing and Heating Company (Allied) for the purchase and installation of five heating units for the Tooele Army Depot, Tooele, Utah. Allied subcontracted a portion of the work to petitioner's employer, Campbell & Robinson Construction Company. In connection with this subcontract, petitioner was assigned by his employer to work on rigging to hoist equipment to the top of a depot building. A United States Army Safety Officer observed petitioner working more than 35 feet above the ground without safety nets, lines, or

planking, in violation of federal and state regulations, and he brought this to the foreman's attention and the foreman agreed to correct the situation. The situation was not corrected, however, and several hours later petitioner fell and sustained a serious injury to his right shoulder.

Petitioner then brought this suit in the United States District Court for the District of Utah pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346, alleging negligence on the part of the United States. The United States, in turn, filed a third-party complaint against Allied. Following a trial the district court found that the government had retained and exercised control over the work performed by the contractor and that its safety officer had been negligent in failing to remain in the area to see that an unsafe and dangerous working condition was corrected. The court concluded that the United States was liable to petitioner for $66,307. The court further found that Allied had failed to meet its contractual duty of ensuring that adequate equipment would be provided for the employees of its subcontractor and therefore that Allied was liable to the government for the full amount awarded to petitioner.

The United States and Allied both appealed. The court of appeals reversed the award of damages to petitioner on the ground that under local Utah law, as interpreted in *United States* v. *Page*, 350 F.2d 28 (C.A. 10), certiorari denied, 382 U.S. 979, the government had no control over, or duty to, the subcontractor's employees. For that reason, the court also reversed the award of damages against Allied.

Petitioner's sole contention is that the court of appeals incorrectly interpreted Utah law on the question of a contractee's duty to a subcontractor's employees. However, as petitioner concedes (Pet. 4), the Utah Supreme Court

has never ruled on that issue. In deciding *United States* v. *Page, supra,* the court of appeals reviewed local law and concluded that Utah did not make a contractee responsible for the safety of his contractor's employees (350 F.2d at 33-34):

> The general law on the subject casts serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries to employees of the independent contractor. * * * The Utah Supreme Court apparently has not been faced directly with this question, but the view taken by the courts in the above cited cases [that there is no duty] is supported by dictum in *Dayton* v. *Free,* 46 Utah 277, 148 P. 408, and nothing to the contrary has been advanced.

Petitioner alleges (Pet. 4) that the reasoning of several Utah decisions supports a contrary interpretation of Utah law. Those decisions, however, all antedate *Page.* Consequently, the court of appeals was justified in following its own decision in *Page.* The question of the reasonableness of the court's interpretation of Utah law does not warrant review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[1]Petitioner offers no support for his contention (Pet. 5) that Utah law is identical to that of California and Florida. Thus there is no basis for his claim that the decision below conflicts with *Thorne* v. *United States,* 479 F.2d 804 (C.A. 9) (interpreting California law), and *Orr* v. *United States,* 486 F.2d 270 (C.A. 5) (interpreting Florida law).